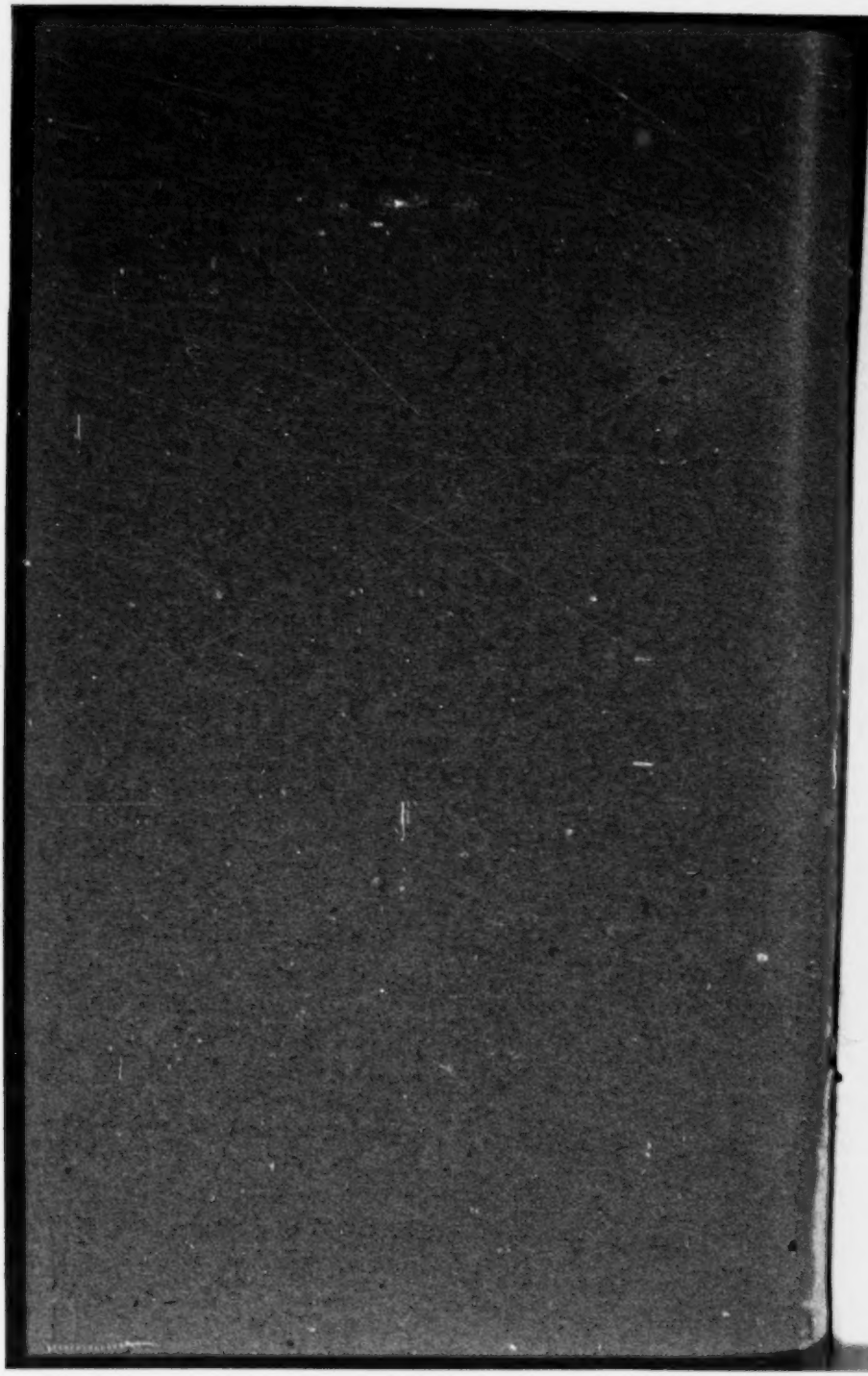

13507

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 518.

MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR AND PETITIONER,

vs.

ELIZA MAUD HILL ET ALS.

PRELIMINARY STATEMENT.

This court has once before in this same case reviewed and reversed the wrongful judgment of the circuit court of appeals for the ninth circuit.

Mutual Life Ins. Co. *vs.* Hill, 178 U. S., 347.

As now made up, the record involves in another aspect the erroneous application by the courts of the ninth circuit of the premium-notice laws of the State of New York to insurance business transacted outside of the State of New York, and the error now complained of is allied with and

is quite equal in public importance to the errors which engaged the attention of this court in the cases of—

Mutual Life Ins. Co. *vs.* Phinney, 178 U. S., 327.
Same *vs.* Sears, 178 U. S., 345;
Same *vs.* Hill, 178 U. S., 347;
Same *vs.* Allen, 178 U. S., 351;
Same *vs.* Cohen, 179 U. S., 362;

all of which were brought within the appellate jurisdiction of this court by the writ of certiorari.

As appears from the record in the cause and from the opinion of this court heretofore delivered therein, *ubi supra*, the policy of insurance sued on was delivered to Hill, the insured, at Seattle, Washington, where he resided and where the first and only premium paid was paid by him on or about April 29, 1886. The policy was payable "unto Ellen Kellogg Hill, wife of George Dana Hill, * * * for her sole use, if living, * * * and if not living, to such of the children of their bodies as shall be living at the death of said wife, or their guardian for their use."

George Dana Hill, the insured, continued to reside at Seattle until December 4, 1890, when he there died, no premiums except the first having been paid upon said policy.

The primary beneficiary, Ellen Kellogg Hill, died during her husband's lifetime, on February 14, 1887.

Of the secondary beneficiaries, the children of the insured, four survived their father, all being minors at the time of his death.

No premiums on said policy were ever tendered by said beneficiaries nor by any one on their behalf, and this suit was not instituted by or for them until October 19, 1895,

about five years after the death of the insured and more than eight years after the payment of any premium on the policy.

The circuit court and circuit court of appeals of the ninth circuit, disregarding the plain principles of law declared by this court in the group of cases above cited, gave judgmen against the insurance company and in favor of the beneficiaries named therein for the sum of $29,020.

The judgment of the circuit court of appeals in the cause is final, and unless this honorable court shall again intervene in the proceedings by issuing the writ of certiorari, your petitioner, under the guise of law, but most wrongfully and unjustly, will be compelled to pay over the large sum of money above set forth.

The details of the cause and the precise errors committed by the lower courts are recited more at length hereinafter.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1902

Ex Parte THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Petitioner.

Petition for Writ of Certiorari requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination, the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL and EUGENE C. HILL by his Guardian EBEN SMITH, Defendants in Error.

BRIEF OF PETITIONER

STATEMENT.

The Mutual Life Insurance Company of New York, a corporation chartered as such by a special act of the Legislature of the State of New York, in April, 1886, insured the life of George Dana Hill by a policy in the sum of Twenty Thousand Dollars, on the ordinary life plan,

payment of the death loss to be made to his wife, if living at the time of the death of the insured, and if not, to such of the children of their bodies as should be living at the time of the wife's death. (Petition, p. 5-6.) At the time of taking the insurance, Hill was a resident of the city of Seattle, and a citizen of the then territory (now state) of Washington. The Insurance Company complied with the laws of the then territory, now state, of Washington, requiring a foreign corporation transacting business therein, to file with the Secretary of State a copy of its Articles, and to appoint an agent in its particular place of business in the territory. The statutory agent was also the general agent of the Insurance Company in the state and territory representing it in the conduct of business therein. (Record, p. 94-93.)

The Insurance Company also had a general office at San Francisco for the conduct and management of its business affairs on the Pacific Slope. The application for insurance and the physical examination of the applicant, were made at Seattle. The application was delivered to the agent of the Company at Seattle, and by him transmitted to the general agent at San Francisco, who transmitted it to the Home Office in New York, and in due course of time the policy of insurance was issued and transmitted by mail through the office at San Francisco, to the agent at Seattle, where, upon payment of the first annual premium of $814.00, the policy was delivered to George Dana Hill. (Petition, p. 5-6. Record, p. 109-110.)

Prior to, at the time of, and subsequent to the 29th of April, 1886, there was in force and effect in the territory of Washington, a statute as follows:

"Section 2478. All corporations now existing, or hereafter formed under the laws of other states or terri-

tories of the United States for the conducting and transacting of marine, life and fire insurance, or any other business not inconsistent with the organic law of this territory, shall have full power and authority to sue and be sued, hold, purchase and acquire, sell and dispose of real and personal property, and generally to do and perform any and every act, and transact business within this territory, in the same manner and to the same extent as though such corporation had been organized under the laws of this territory." (Petition, p. 3.)

The application for insurance, and endorsements upon the policy, were made parts of the contract. In the application there was a stipulation and condition to the following effect:

"And it is agreed there shall be no contract of insurance until a policy shall have been issued and delivered by said Company, and the first premium thereon paid, while the person proposed for insurance is in the same condition of health described in this application; and if said policy be issued, the declarations, agreements and warranties herein contained, shall be made a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York." (Petition, p. 5. Record, p. 73-74.)

Under the title "Special Notice to Applicants and Policy-Holders" printed upon the application, is the following:

"Fourth. Policy holders must not expect to be notified when their premiums will be due. It is a practice of the Company to send these notices, as reminders, when the address is known, but no responsibility is assumed on the part of the company, in consequence of their non-reception." (Record, p. 75.)

Among the endorsements on the policy is the following:

"Each premium is due and payable at the Home Office of the Company in the city of New York; but will be accepted elsewhere when duly made in exchange for the Company's receipt signed by the President or Secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived." (Petition, p. 7-8.)

George Dana Hill continued to reside at Seattle, Washington, from the date of his application in April, 1886, until his death, December 4, 1890. (Petition, p. 4.) No premium was ever paid subsequent to that paid upon the delivery of the policy in 1886. The renewal receipt signed by the Secretary of the Company for the second year's premium was transmitted to the agent at Seattle, who carried it to the insured, George Dana Hill, and personally notified him of the time the second annual premium fell due, demanded payment of the same, and offered the renewal receipt in exchange for payment of the premium. Hill expressed himself to the agent as being unable to make payment, and after repeated efforts to collect the premium, the agent returned the renewal receipt to the San Francisco office. The receipt was again sent back from the San Francisco office to the agent at Seattle, to make further request and to offer Hill further opportunity of making payment. The receipt was again presented to Hill, with request of payment, which he failed and refused to make, whereupon the receipt was sent back to the San Francisco office, and from there to the Home Office, and the policy was thereupon entered upon the books of the Company as lapsed and terminated, and thus

the matter remained during the life time of the insured. (Petition. p. 8. Record, 113-115-116-117.)

After the death of George Dana Hill, this action for the recovery of the amount of the policy, was begun in 1895, in the Circuit Court for the District of Washington, Northern Division. The amended complaint pleaded certain provisions of the application and set forth the policy and endorsements upon it, which were made part of the contract of insurance. Performance by the insured of the conditions of the contract was averred in the complaint, but controverted by the Company. The statute of New York of 1876 provides:

"No Life Insurance Company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest shall be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the Company, at his or her last known post office address, postage paid by the Company or by an agent of such Company or person appointed by it to collect such premium." (Petition, page 2.)

The amendment of 1877 to this Act has the following provision:

"The affidavit of any one authorized by Section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has

been given to the Company, in pursuance of said section, shall be presumptive evidence of such notice having been given." (Petition, p. 3.)

The Mutual Life Insurance Company, as a first defense, affirmatively alleged that from the date of the application until his death, George Dana Hill was a citizen and resident of Seattle, Washington, and there made to the agent of the Mutual Life Insurance Company his written application for insurance; that his medical examination was had at Seattle; that the application was forwarded from Seattle by the local agent to the general San Francisco agency, and from there to the Home Office; that upon the issuance of the policy, it was transmitted to the San Francisco office, and thence to Seattle, where, upon the payment of the first annual premium to the local agent, the policy was delivered to the insured. The provision in the application that there should be no contract of insurance until the policy had been delivered by the Company on the first premium paid, while the person proposed for insurance was in the same condition of health described in his aplication, was pleaded, and also the failure, neglect and refusal of the assured or any of the defendants in error, to pay the annual premium of $814.00 due April 29, 1887. (Record, p. 18. Petition, p. 10.)

A second defense was that said Hill defaulted in making payment of the second annual premium of $814.00 falling due April 29, on account of which the Company had entered the policy upon its books as lapsed and terminated; that neither Hill during his lifetime, nor any one in his behalf, sought to have the policy restored, or made tender of any default of the premiums, but acquiesced in the course of the Company in terminating the policy for

non-payment of premium, and the mutual abandonment of the policy.

As a third affirmative defense, the failure, neglect and refusal on the part of the insured, George Dana Hill, and each of the beneficiaries, to pay the annual premium of $814.00 falling due April 29, 1887, were alleged, and that no other than the first annual premium had ever been paid, or offered to be paid, either by the insured or any of the beneficiaries; that the Mutual Life Insurance Company was a mutual life association chartered under the laws of the state of New York; that at the time of the delivery of the policy, and subsequent thereto, it had large numbers of outstanding policies, and its membership consisted of many thousands of persons whose lives were insured by the Company in various sums, and that during such times, the Association was dependent upon the proceeds of the funds arising from the payment of the premiums of its policy holders, to meet its death losses, and in order to meet its liabilities and discharge its duties to its members, it was necessary that every member of the Association make payment of his premiums, and also make such payment as the same respectively became due; that but a single annual premium had been paid upon this policy; that neither, on the part of Hill during his life time, had there been any offer to pay any part of the premiums for the years 1887, 1888, 1889 or 1890, nor upon the part of any of the beneficiaries to make payment before the commencement of or during the pendency of the action. (Petition, p. 10-11. Record, p. 25.) That by reason of the premises, plaintiffs in the trial court were estopped from claiming the policy to be an existing contract, or from claiming any right of recovery thereon.

As another affirmative defense, it was alleged that

by the conduct of Hill in declining to make payment of the second annual premium, as he was repeatedly urged to do when the renewal receipt was presented to him, the Company was induced to believe, and did believe, that the contract of insurance was abandoned, and continued to act upon that condition of things, and was induced thereby to abstain from giving any notice under any statute, by mail, or otherwise, for the purpose of terminating the policy. (Record, 29. Petition, 11.)

It was also affirmatively pleaded that the Mutual Life Insurance Company was a mutual life association, as before stated; that on the 31st day of December in every year, it ascertained the amount of its liabilities, which depended upon the policies issued by it, remaining in force; that it made ascertainment of liabilities and gave statements to its policy holders for their information and protection; that its liabilities depend upon its policies upon which premiums are paid that by reason of the failure and declination of Hill to pay the premium of $814.00, falling due April 29, 1887, petitioner caused his policy to be entered upon its record as lapsed and terminated, and the same was not included as a liability is its ascertainment and statement to its policy-holders—that it had induced its premium paying policy holders to rely upon such statements and reports, and that the Hill policy did not constitute a liability; that the first annual premium paid in April, 1886, upon the policy was chiefly absorbed and expended in the payment of fees and commissions of agents and examiners, and office expenses relating to the obtaining and issuing of the policy; that the said premium of $814.00 purchased only one year's insurance, and that there never was in fact or in equity any balance or credit by way of surplus, accretion or reserve owing upon

the policy, and that to allow a recovery upon this policy tended to the disorganization and destruction of petitioner's insurance business, and on account thereof, the plaintiffs below should be estopped from recovery. (Record, 31-32. Petition, 13.)

A jury trial was had, resulting in a verdict of $29,020 (Record, 48) against your petitioner, upon which judgment was rendered (Record, 63), which was affirmed on error to the Circuit Court of Appeals (Record, 207), and plaintiffs' petition for re-hearing denied. On the trial it was shown by uncontradicted evidence that the application was made, the medical examination had, the first annual premium paid, and the insurance policy delivered to George Dana Hill at Seattle, Washington. It was admitted that no other premium had ever been paid, or offered to be paid, except the first (Petition, 16); that Hill's death occurred December 4th, 1890; that from the date of the application until his death, his residence, pla e of business and post office address, were at Seattle, Washington, and that said George Dana Hill had no post office address in the state of New York. (Record, 69-71-72.) See admitted allegation (Paragraph 5, Record, p. 28). It was also shown by uncontradicted evidence that at the time the second annual premium became due, the renewal receipt of the Company was placed in the hands of its local agent at Seattle, who presented it personally to George Dana Hill, and advised him of the due date, and amoust of premium, and called upon him for payment. Repeated requests for premium were made, extending over a period of a month or more, but through lack of ability or disinclination, the insured failed, declined and refused to make payment, and that after such ineffectual attempts to collect the premium, the renewal

receipt was sent to the Home Office, and the policy entered as lapsed upon the books of the Company. (Petition, p. 14-15. Record, 68-9.) It was admitted the wife died before the insured, and it was shown by undisputed testimony that the children of the deceased wife and the insured, who were all minors residing with the insured, George Dana Hill, in his home at Seattle, and under his parental care and authority, to the date of his death. (Petition 15, Record 84.)

The third and last affirmative defenses were substantiated by introduction in evidence of your petitioner's charter. (Record, p. 93 to 101; also p. 141, and the testimony of Sherwood Gillespie.) Upon the close of the testimony, your petitioner requested the judge of the trial court, upon the whole case, to instruct a verdict in its favor. (Record 149-151.) Motion was refused, the judge saying:

"Mr. Allen, you may have your motion noted and state the grounds as fully as you wish to have your objections preserved in the record. I have thought about this case a good deal and I think it ought to be tried out fully at this time, and I will submit it to the jury for a verdict, After a verdict, either party may move against the verdict, move for a judgment or move for a new trial, or make both motions if you want to, and to make the record full for review in the Appellate Court, and I will hear your argument at that time, instead of taking up time to do it now. This case has been once through the course of a lawsuit up to the court of final resort, been through this Court and up to the Supreme Court of the United States and sent back here without having the law of the case settled. Now, a good deal of time has been consumed in this litigation to no purpose, and my object is to have your record made up so complete that if either party does take this case again up to the higher court, that it will be in

shape so that a final determination can then be made." (Record 150.)

Pursuant to the judge's request, the petitioner stated the grounds for its motion or request to direct a verdict (Record, p. 151-155), and briefly summarizes the same as follows:

First: Because the undisputed evidence is that the contract of insurance was actually delivered at Seattle, Washington, and the first annual premium there paid upon its delivery to the insured, and the contract thereby, under the ruling of the Supreme Court of the United States, was a Washington contract.

Second: Because the proof is undisputed that no other than the first annual premium was ever paid upon the policy.

Third: Because it was admitted in the pleadings and stipulated by the parties that the residence of the insured, George Dana Hill, from the time of the application in April, 1886, to his death, December 4, 1890, was at Seattle, Washington, and it was likewise proven and conceded that during all of said time, his post office address was at Seattle, Washington, and that he had during that time no post office address in the state of New York.

Fourth: Because in addition to the facts of the first premium being paid, and the policy delivered at Seattle, the application contains a notice and warning that notice of the due date of premiums is not to be given. The policy itself expressly provides that no other notice than that it contains shall be given of the due date of premiums, any statute to the contrary notwithstanding.

Fifth: Because the evidence is undisputed that at the time the second annual premium became due, the agent

of your petitioner, possessed of the renewal receipt, duly executed, applied to the insured, George Dana Hill, for the payment of the premium then due, in exchange for the receipt, at the city of Seattle, and that Hill failed and declined to make payment; that Hill failed and declined to make payment after being repeatedly called upon for payment by the agent tendering the renewal receipt.

Sixth: Because it is admitted in the pleadings that none of the plaintiffs in the trial court ever paid, or offered to pay, any premium prior to and during the pendency of the action.

Seventh: Because in the whole transaction of this insurance, so far as dealing with premiums is concerned, and meeting the conditions of the policy, George Dana Hill acted for all parties, and notice to him, and knowledge, failure and refusal on his part, was knowledge, failure and refusal on the part of the plaintiffs in the trial court, and what would bind or estop him, or terminate the contract as far as he is concerned, has the same effect with them.

Eighth: Because it is proven your petitioner was a Mutual Life Association, whose membership consisted of its premium paying policy holders, and that the burden of paying losses falls upon such policy performing members, and that in this case where four consecutive years passed without payment of any premium, and the action was commenced without payment or offer of payment of any premium, or in any way making good the liability for premiums, recovery cannot be had.

Ninth: Because if the notice statute of New York touches this contract of insurance, it does so solely by the convention of the parties, and not by operation of law, and the parties have expressly agreed that so far as

premium notices are concerned, such statute shall not apply to their contract. (Record 151-155.)

The Court refused to give the instructions of your petitioner to the jury, along the line of the foregoing contentions. (Record 156-163.) The trial judge, in submitting the case to the jury, assumed that the rights of the plaintiffs below were saved by the New York statute unless the contract had been abrogated by the conduct of the plaintiffs themselves after the policy was delivered. (Record 167.) The trial judge also instructed the jury that the insured, George Dana Hill, was not the agent or trustee of the beneficiaries, and had no power or authority by his refusal to pay the premium, or his abandonment or abrogation of the contract, to bind or affect the beneficiaries, and that unless the infant beneficiaries themselves abrogated the contract, or especially authorized the insured, George Dana Hill, to do so, no abrogation could take place. (Record 168.)

Your petitioner's motion for a new trial was denied (Record 51), and also its motion for judgment in its favor, notwithstanding the verdict and judgment rendered. (Record 63.)

ARGUMENT.

The issues here presented are substantially those considered by this Court in the cases of

Mutual Life Insurance Co. v. Phinney (178 United States 327).

Mutual Life Insurance Co. v. Sears (178 United States 345).

Mutual Life Insurance Co. v. Hill (178 United States 347).

Mutual Life Insurance Co. v. Allen (178 United States 351).

Mutual Life Insurance Co. v. Cohen (179 United States 362).

With deference to the Circuit Court of Appeals, it is the purpose of counsel of The Mutual Life Insurance Company, if able, to convince this Court that its opinions just mentioned were not, either in leter or spirit, correctly interpreted or applied by the subordinate court, and in consequence petitioner not only lost the benefit of those opinions, but had them turned against it.

Before entering upon the argument, we wish to state there were really no questions of fact left for the jury. By both parties the essential facts were conceded to be undisputed. Each requested the trial judge to direct a verdict. (Record 149-150.) The only questions submitted to the jury were: Did the plaintiffs below, the beneficiaries themselves, abrogate the contract of insurance, or did they especially authorize the insured, George Dana Hill, to do so? Or, did they with full knowledge of all the facts and circumstances of what he had done, ratify and adopt his action in declining and refusing to pay the second annual premium falling due in 1887? The oldest of these beneficiaries was at that time but fourteen years of age, and hence their legal incapacity; so that no issue of fact could be predicated upon their conduct in the premises We present the following reasons why a writ of certiorari should be granted under Sec. 6 of the Act of March 3, 1891 (26 Stats. at Large), requiring the record and cause to be sent up to this Court for its consideration.

I.

RECOVERY IN THIS CASE IS IN THE NATURE OF A SPECIFIC PERFORMANCE BY PARTIES WHO HAVE WHOLLY FAILED TO MEET THE OBLIGATIONS OF THE CONTRACT UPON THEIR OWN PART.

The policy of insurance is one entered into between George Dana Hill and the Mutual Life Insurance Company of New York, a mutual life association. The policy bears date April 29, 1886. The insured, George Dana Hill, died December 4, 1890. A single annual premium was paid upon the delivery of the policy, and nothing more. The action was commenced by the beneficiaries in the year 1895, without having tendered anything on account of delinquent premiums or made any offer of fulfilling the obligations of the contract on the part of the insured, before seeking recovery.

In instructing the jury, the judge said:

"It is also a conceded fact in the case that no other premium was ever paid to the company except the first one, and that there was a default made in the payment of premiums, which accrued on the 29th day of April, 1887, and on the same date in 1888, and the same date in 1889, and the same date in 1890." (Record 165-6.)

The allegations of the answer, that nothing had been paid or offered to be paid on account of the premiums, prior to the commencement of the action, are not controverted. (Record 35.)

In the case of Mutual Life Insurance Co. v. Phinney, 178 United States 327, near the close of the opinion, the Court says:

"A single further matter requires notice, and we mention it simply to indicate that we have considered, although we do not decide, the question involved therein: The contract of insurance is a peculiar contract, especially when made with a mutual insurance company, for although in terms a contract with a corporation, it is in substance a contract between the insured and all other members of that company. The character of this contract was fully considered and discussed by this court in New York Life Insurance Co. v. Statham, 93 U. S. 24, and to that case we refer without quotation. Now, whether the insurance company, if the law of New York be applicable, could insist upon a forfeiture without giving the notice prescribed by the Statutes of that state, and, enforcing it, forfeit all premiums paid, all obligation for the return of the surrender value, all right of the insured by subsequent payments to continue the policy in force, is one question. But it is a very different question whether the executrix of the insured, after his long delinquency in the payment of premiums, can enforce the contract as against the other insured parties, thereby diminishing their interest in the accumulated reserve. Ordinarily no one can enforce a contract unless on his part he performs the stipulated promise, and it may be that this rule is operative in this case. We do not care to decide the question, and only mention it for fear that it should be assumed we had overlooked it. It is a question which may never arise in the future litigation of this case, and until it necessarily arises we do not feel called upon to decide it."

Acting upon this significant suggestion, plaintiff in error, by an amended answer, presented this issue directly by way of two affirmative defenses, in which it pleaded it was such a mutual insurance association, whose membership consisted of its premium paying policy holders. It substantiated these defenses, in addition to the foregoing proofs, by the production in evidence of its charter, from which the following quotations are made:

"Section 7. Every person who shall become a member of this corporation, by effecting insurance therein, shall the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees, and no premium so paid shall ever be withdrawn from said company, except as hereinafter provided, but shall be liable to all the losses and expenses incurred by this company during the continuance of its charter." (Record 96.)

"Section 10. The whole of the premiums received for insurance by said corporation, except as provided for in the following sections, shall be invested in bonds and mortgages on unincumbered real estate within the State of New York, the real property to secure such investment of capital shall in every case be worth twice the amount loaned thereon." (Record 97.)

"Section 13. * * * Any member of the company who would be entitled to share in the profits, who shall have omitted to pay any premium, or any periodical payment due from him to the company, may be prohibited by the trustees from sharing in the profits of the company, and all such previous payments made by him shall go to the benefit of the company." (Record 98-99.)

And also by the testimony of its general agent at Seattle. (Record 139-142.) This defense was neither submitted to the jury, nor considered by the subordinate courts, although duly pressed upon the court's attention. (Record 154, Subdivision 8, 161.) By proper bill of exceptions and assignment of errors, the same question was presented to the Circuit Court of Appeals, and is now presented to this Court.

The beneficiaries in this policy stand before this Court conceding that but a single annual premium has been paid upon the policy; that for four consecutive years nothing was paid, when the insured died; that after a lapse of

nearly five additional years, without payment or tender of any of the contributions due on account of this policy, to the death-fund, they are asking the members of the society, who have created that fund, to pay the amount of the policy. Was the Statute of New York—if applicable—designed to effect such an end? It is a violation of the fundamental principles of both equity and justice. It is conceding non-performance upon their part, and at the same time demanding a reward for such non-performance, and exacting payment for their unfulfilled contract, from a fund created by the members of the association who have paid their premiums. It is in the nature of refusing to do equity, but insisting upon equity from others. The beneficiaries, under the policy, are the moving parties in this litigation, and are calling for full payment of their policy from a fund others have created, and to which they and their insured have refused to contribute. As stated in the Phinney opinion, it is not the question whether the insurance company—if the law of New York be applicable—can insist upon the forfeiture, without giving the prescribed notice, but it is *the very different* question propounded in that opinion, "whether the executrix of the insured, after his long delinquency in payment of premiums, can enforce the contract as against the other insured parties, thereby diminishing their interest in the accumulated fund."

In any other relation the parties would have no standign for the enforcement of their claim. Why should it be given them against a mutual life insurance company? This Court has likened this action to a suit for specific performance. If we follow the analogies of the law of specific performance, the plaintiffs would have no standing in Court, because there is a lack of mutuality which

is essential in such a suit. The insurance company could not have compelled payment of premiums as they fell due in the years 1887, 1888, 1889 and 1890, for the reason that there was no obligation on the part of any one to pay such premiums. In Marble Co. v. Ripley, 10 Wallace 359, it is said:

"Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former." (P. 359.)

Hill, though frequently requested, and though having the renewal receipt tendered him, had refused to pay the premium falling due in 1887, and had continued in that course until his death in 1890.

In Kelsey vs. Crowther, 162 United States, 404, it was said:

"The action was in the nature of a bill for specific performance of a contract for the sale and purchase of a tract of land. If the contract is construed as making it the duty of Crowther to tender the abstract, yet his failure to do so did not dispense with performance or the offer to perform on the part of the complainants. His failure to furnish the abstract might have justified the complainants in declaring themselves off from the contract, and might have formed a successful defense to an

action for damages brought by Crowther. But if they wished to specifically enforce the contract, it was necessary for the complainants themselves to tender performance."

In Walsh vs. Preston, 109 United States, the Court, at page 318, says:

"The failure on the part of the party applying for it to perform his own part of a contract wholly executory, or to show any sufficient reason for the failure, has always been held to be ground to refuse relief and turn the party over to his action at law."

In Hepburn vs. Auld, 1 Cranch., 330, Chief Justice Marshall, in delivering the opinion, says:

"To entitle themselves to the money for which this suit was instituted, it is incumbent on the plaintiffs to show that they have performed the very act on the performance of which the money became payable, or that they are excused by the conduct of the defendant for its non-performance."

In no event is relief in the nature of specific performance granted, except for the purpose of meting out equity and justice.

In McCabe vs. Matthews, 155 United States, 550, Justice Brewer states the rule as follows:

"A decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld according as equity and justice seem to demand in view of all the circumstances of the case."

Pratt vs. Carroll, 8 Cranch, 471.
Holt vs. Rogers, 8 Peters, 420.
Willard vs. Taylor, 8 Wallace, 557.
Hennessey vs. Woolworth, 128 United States, 438.

II.

THE FIRST PREMIUM WAS PAID, AND THE POLICY DELIVERED AT SEATTLE, WHERE HILL RESIDED AND HAD HIS POST OFFICE ADDRESS FROM THE DATE OF THE APPLICATION UNTIL HIS DEATH.

The evidence was direct and unquestioned that the first premium was paid, and the policy delivered, at Seattle, in 1886. (Record 107-109.) It was stated in the application that Seattle was the residence and post office address of George Dana Hill. (Record 71.) It was also stipulated (Record 69), and alleged in the answer, and not denied, that Hill had no post office address in the state of New York. (Record 28, Paragraph V.) The policy in this, as in the Cohn case, contained a stipulation that it should not be binding until the first premium had been paid, and the policy delivered. In the Cohen case, 179 United States 264, the Court says:

"The premium was paid and the policy delivered in the state of Montana. Under those circumstances, under the general rule, the contract was a Montana contract, and governed by the laws of that state."

(It is claimed another clause in the application takes the contract out from this rule. This clause we will consider later in the brief.)

In the Cohen case the Court also says:

"It is worthy of notice that the State of New York has changed its legislation repeatedly in the last quarter of a century in respect to this very matter of notice."

And this fact strengthens the conclusion that it was not changing charters—"but prescribing only that which in

its judgment from time to time was the proper rule for business transacted within the state." (179 United States 266.)

In support of the same conclusion, attention was called by the Court to the thirty-day notice—that it might be reasonable within the state—but obviously in many cases outside the state, would be of little value. Attention was also directed to Section 2 of the Statute, providing that a certain affidavit should be presumptive evidence of giving notice, but which could not be operative in other courts than those of New York, and thereupon drew the following deduction:

"These considerations lead to the conclusion that the Statute of New York, directed as it is to companies doing business within the state, was intended to be, and is, in fact, applicable only to business transacted within that state."

In contemplation of this Statute thus interpreted, we respectfully insist, where the insured has no post office address in the state of New York, the statute does not apply, and was not intended to apply. The giving of notice to a post office address in Seattle, perhaps three thousand miles distant from that state, is not the transaction of corporate business in the state of New York, and for that reason the statute of New York has no application to the case. The provision in the Act of 1897, Chap. 218, Sec. 92, referred to in the Cohen case, that notice shall be addressed and mailed to the last known postoffice address of the insured, or his assignee, in the state of New York (see statutes in appesdix hereto), is simply a legislative declaration of the meaning of the statute from its enactment.

III.

THE CIRCUIT COURT OF APPEALS ERRONEOUSLY HELD THAT THIS COURT HAD IN ALL RESPECTS, EXCEPT UPON A SINGLE QUESTION, UPHELD ITS FORMER OPINION AND DECISION IN THIS CASE.

In its opinion (Record 201) the Circuit Court of Appeals says that "Upon the former hearing it was held by this Court that the policy of insurance in controversy was a New York contract, according to its terms, and that the laws of New York of 1877, Chap. 321, Sec. 1, providing that no insurance company shall declare a policy forfeited for non-payment of premiums, without having first given the assured thirty days' notice that the premiums were due, and that the policy would be forfeited if they were not paid, were mandatory; also that under such a policy the right of the beneficiaries could not be affected by an attempted waiver of the statute by the assured or by other than their own act and agreement. The judgment of this Court was reversed, upon the ground that the answer of the defendant, plaintiff in error, alleged that the insured and the company had agreed to abandon and determine the contract of insurance, and that the beneficiaries (plaintiffs below) had failed, neglected and refused to pay the second premium, thus refusing to continue the policy. This allegation of the answer, it was said, discloses a distinct agreement on the part of the insured and the company to waive and abandon the policy, and all rights and obligations on the part of the parties thereto. (Mutual Life Ins. Co. vs. Hill, 178 U. S. 347-350.)

"The case was sent back to the Circuit Court for trial on this question alone." * * * (Record 201-202.)

"The decision of the Court upon the other points not having been criticised or reversed by the Supreme Court, is now the law of the case for this Court."

Kankakee Coal Co. et al., Impleaded, vs. Crane Bros. Mfg. Co. 38 Ill. App. Ct. Rep. 555.
Matthews vs. Bank, 100 Fed. 397.
Texas & Pacific Ry. vs. Wilder, 101 Fed. 198 (Record 203).

This extremely artificial and, we think, erroneous interpretation of the opinions of this Court has not only debarred plaintiff in error of the advantages of the aid of those opinions, but has caused them to be turned against it. This Court, as already stated, has held the statute of New York was a mere regulating statute, and only applicable to business transacted in that state; that it did not operate *extra* territorially, and was subject at all times to legislative change or alteration, and that parties to policies were as free to deal with their contracts as they were with any other contracts not affected by this statute. We quote from the Mutual Life Ins. Co. vs. Sears, 178 United States 345, as follows:

"As we held in the prior case, there is nothing in the New York statute (if controlling at all)to prevent the parties from dealing with that as any other contract, and if they chose to abandon it, that action is conclusive."

The interpretation of this statute by the Circuit Court of Appeals is radically different. It regarded the statute as incorporated into all contracts of insurance, whether within or without the state of New York, and as dominating them throughout, and controlling and restraining the parties, so that they had not the power by any agreement or device to alter or terminate a policy after it had been

entered into, except by compliance with the provisions of the statute. In the case of the Mutual Life Ins. Co. vs. Hill, 97 Federal 263 (this case), the Circuit Court of Appeals expressed its views of the statute and a policy of insurance etnered into with a New York company, whether within or without that state, as follows:

"In Society v. Nixon, as in this case, it was contended that the statement made by the insured, when requested to pay the premium due upon the policy, that he did not intend to keep the policy in force, amounted in law to a waiver on the part of both the insured and the company of the notice required to be given by the statute of New York. Replying to this contention, the court said:

'That the statute of New York prescribes the condition upon which a policy may be forfeited for the nonpayment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived either by the company or the assured or by both together. Society v. Clements, 140 U. S. 226, 233, 11 Sup. Ct. 822; Hicks v. Insurance Co. 9 C. C. A. 215, 60 Fed. 690; Griffith v. Insurance Co. (Cal.) 36 Pac. 117, Warner v. Association, 100 Mich. 157, 58 N. W. 667.'

Entertaining no doubt of the correctness of the conclusions therein reached, we respectfully decline to further discuss the same identical questions. It is enough to say that we adhere to the views therein expressed." * * *

"The affirmative matters alleged in the answer constituted no defense to the cause of action alleged in the complaint. The contract of insurance became complete upon the payment of the first premium. It was kept alive by the provisions of the statute of New York, because the contingency of forfeiture, as therein provided for, had not happened. The contract is to be read in the light of the statute, the same as if the statute had literally been incorporated in the policy. It was not essential to

the right of recovery herein that the defendants in error should have paid, or tendered payment of, the premiums due on the policy before commencing the action. When Hill died the relation of debtor and creditor existed between the insurance company and the beneficiaries named in the policy. The unpaid premiums, with legal interest from the date they became payable, constituted a claim on behalf of the insurance company to be deducted when the company paid the amount due on the policy; thus leaving it in precisely the same situation in which it would have been if the premiums had been paid when they became due. The complaint stated a good and complete cause of action. There could not be any forfeiture of the policy unless the insurance company in its answer alleged, and, if a trial was had, proved, non-payment of a premium due, after regular service of the notice of non-payment as required by the statute. Carter v. Insurance Co., 110 N. Y. 16, 17, N. E. 396; Phelan v. Insurance Co., 113 N. Y. 147, 20 N. E. 827; Baxter v. Insurance Co., 119 N. Y. 450, 23 N. E. 1048; De Frece v. Insurance Co., 136 N. Y. 144, 32 N. E. 556; Griesemer v. Insurance Co., 10 Wash. 203, 38 Pac. 1031; Griffith v. Insurance Co., 101 Cal. 627, 642, 36 Pac. 113; Osborne v. Insurance Co. (Cal.), 56 Pac. 616; Hicks v. Insurance Co., 9 C. C. A. 215, 60 Fed. 690, 692; Mullen v. Insurance Co. (Tex. Sup.), 34 S. W. 605.

The plea of estoppel, as set forth in the third affirmative defense, is but another name for waiver. There is no question concerning the plea of estoppel that can be distinguished from the question as to the plea of waiver. As the parties could not waive the requirements of the statute as to the manner in which the policy could be forfeited, how could the beneficiaries, who had vested rights therein, be devested of such rights, except in the manner provided by law? They certainly could not be bound by any declarations which their father may have made in his lifetime to any agent or officer of the insurance company as to his inability to pay the premium then due upon the policy, or that he did not intend to pay that or any

future premium, or that the insurance company might consider the policy forfeited without giving the notice specified in the statute. To so hold would entirely abrogate the provisions of the statute and of the policy. As was said by the Court in Baxter v. Insurance Co.:

'When the provisions of this statute are adopted in a contract of insurance for the purpose of modifying the forfeiture clause and the other strict conditions costained therein, then the clause and these conditions should be so construed as to give to the assured the full benefit contemplated, without altering any other provision of the policy, if this can be done without violating any rule of law.' " (P. 267-270.)

The same views were reasserted in the case of Mutual Life Insurance Co. vs. Dingley, 100 Fed. 408. (Since reversed by this Court.)

"It is contended that the Court erred in sustaining the demurrer to the affirmative matter of the answer, which alleged that the insured informed the insurance company that he recognized that the contracts of insurance were lapsed, and that he refused to continue his policies, and that it was then mutually agreed between the contracting parties that the policies were lapsed and terminated. It is not asserted that the contracts of insurance were declared forfeited by an instrument under seal, or that any consideration passed to the insured for the cancellation thereof. The matters so pleaded evidently rested in parol. Such oral statements could be of no more binding effect than the express written waiver which was contained in the policies. We have already decided that the parties to an insurance contract cannot be permitted by parol agreement to annul the express provisions of the statute (Society v. Trimble, *supra;* Same v. Nixon, *supra*); and further consideration only confirms our conviction of the correctness of that view. In the Nixon case it was said:

'The statute of New York prescribes the condition upon which a policy may be forfeited for the non-payment

of a premium. The statute is mandatory and controls the contract. Its provisions are not subject to be set aside or waived either by the company or the assured, or by both together.'

Nor can any ground of equitable estoppel arise from the default of the assured in the payment of premiums or any of the facts set forth in the answer. It is not shown that the relation of either party to the contracts was changed, or that the insurance company did or refrained from doing any act to its injury in reliance upon such parol statement of the insured.

It is contended, further, that the New York statute is limited in its application to business done in the state of New York, and applies only to policies issued and delivered in that state to the citizens thereof. The language of the statute is broader than this. It reads: 'No life insurance company doing business in the state of New York shall have power,' etc. The company was a New York company, doing business in that state, and comes within the precise words of the statute. If it had been the intention to restrict the benefits and protection of the statute to the citizens and residents of the state of New York, it is reasonable to presume that that intention would have been expressed. It must have been known to the lawmakers that certain of the life insurance companies of New York were doing an extensive insurance business with residents of other states. The language of the statute extends to all business done by such companies. Its very terms preclude a narrow construction. Hebb v. Insurance Co., 138 Pa. St. 174, 20 Atl. 837; Association v. Musser, 120 Pa. St. 384, 14 Atl. 155; Association v. Ficklin, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; Insurance Co. v. Fields (Tex. Civ. App.), 26 S. W. 280."

Entertaining these views of the nature and effect of the New York statute, and of its control over the power of the parties to alter or deal with the contract,—for that court to hold that the effect of the reversing opinions of this

Court was to affirm this case in all respects,—save the single issue upon which the Circuit Court held it was remanded for trial,—is to nullify the meaning and effect of this Court's opinions. The different interpretation of the New York statute, and its application to the facts of the case expressed by this Court, operated not only as a reversal of the decision of the lower courts, but remanded the case for a new trial, in accordance with the views and interpretation of the New York statute given by this court, in accordance with the spirit of its opinions.

IV.

DID THE PROVISION IN THE APPLICATION FOR INSURANCE, THAT THE CONTRACT, WHEN MADE, SHOULD BE CONSTRUED TO HAVE BEEN MADE IN THE CITY OF NEW YORK, BRING IT UNDER THE STATUTE OF NEW YORK, SO THAT THE REFUSAL OF HILL TO MAKE PAYMENT OF THE PREMIUM COULD NOT AND DID NOT TERMINATE THE POLICY?

We contend this provision did not have such effect, nor did it take the case out from the rules laid down by this Court. That provision in the application follows the statements and representations of the applicant and is as follows: "And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by said company, and the first premium thereon paid, while the person proposed for insurance is in the same condition of health described in this application; and if said policy be issued, the declarations, agreements and warranties herein contained shall be a part thereof, and the contract of insurance, when made, shall be held

and construed at all times and places to have been made in the city of New York." (Petition 5.)

It must be kept in mind the contract came into being in Seattle. There Hill resided and had his only post office address. There he and the company, in the person of its agent, were present when the first payment was made, and the policy was delivered. The application begins as follows:

"APPLICATION to THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK FOR A FIVE YEAR DISTRIBUTION POLICY. Subject to the Charter of said Company and the Laws of said State." (Rec. 71.) And upon it is printed, "Special Notice to Applicants and Policy Holders." "4th. Policy-holders must not expect to be notified when their premiums will be due. It is a practice of the Company to send these notices, as reminders, when the address is known, but no responsibility is assumed on the part of the Company in consequence of their non-reception." (Record 74-75.)

And that the policy itself contains the following stipulation: "Notice that each and every such payment is due at the date mentioned in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived." (Rec. 7. Petition 7.) Such a contract entered into at Seattle, with these specific stipulations, is fully dealt with in the Cohen case, in which at page 267, 179 United States, the Court says:

"It is not doubted that a contract by an insurance company of New York, executed elsewhere, may by its terms incorporate the law of New York, and make its provisions controlling upon both the insured and the insurer."

The Court under this proposition proceeds to demonstrate that the parties sued may incorporate in a part of their contract certain laws of New York, but leave the contract in all other respects unaffected by the laws of that state. It is said the parties may thus agree that the application "is subject to the charter of the Company and the laws of said state. * * * But that is very different from a provision that the contract issued upon such application, should also be in all respects controlled by the laws of New York." (179 U. S. 267.)

Now, under the circumstances, and with these specific stipulations, the parties at Seattle could have agreed that the contract there made, *when* made, "shall be held and construed at all times and places to have been made in New York city." But this, we submit, is a very different thing from stipulating that the subsequent matter of giving notice of the due date of premiums shall be incorporated in the contract, or that the contract shall be *construed* by the laws of New York.

Ex industria it was stipulated at the beginning of the application that the *application* shall be subject to the charter of the Company and the laws of said state, and with equal pains it was expressly stipulated in the policy itself, that as to the payment of premiums, no other notice than that contained in the policy, should be given, and every doubt was eliminated by the further language, "and any further notice required by any statute is thereby expressly waived." (Petition 7-8.) If parties by their convention or stipulation, may incorporate certain of the laws of New York into the preliminary part of their contract, by the same power they may exclude other statutes from other portions of the contract. The laws of New York were placed in the stipulation by contractual arrange-

ment, and the notice-statute was left out of the policy by the same authority. No room is left for inference that the New York notice-statute was incorporated in this policy, or controlled it, in the face of the express stipulation that it was excluded from it, and that a certain stipulated arrangement as to notice was provided, *any statute* to the contrary notwithstanding.

The Circuit Court of Appeals has practically, and, we think, directly, held that the meaning and legal effect would be precisely the same in each of the following contracts of insurance:

(*a.*) A contract made in the state of Washington, but by a stipulation in it, after being made, to be held and construed to be made in the city of New York, and containing the two following express provisions:

The one that the *application* on which the policy rests, and which is a part of the contract, is *subject* to the laws of New York, and the other that the policy fixes the only rule of notice regarding the due-date of premiums, and also declares that the notice required by the statute of New York upon that subject is expressly waived.

(*b.*) A contract entered into in Washington, which not only provides that after it is made it should be construed and held to be made in New York city, but in addition, provides it shall be *subject* to the premium notice statute of the state of New York (as was provided respecting the *application* in this and the Cohen case); and

(*c.*) A contract made in the state of Washington, containing a stipulation that it shall, when made, be construed to be made in New York city, and containing the additional stipulation "to be executed in New York, and construed only according to the laws of that state" (as

in the case of Baxter vs. Brooklyn Life Ins. Co., 119 N. Y. 450-454. See 179 U. S. 267-8).

Such a contention can only be sustained upon the ground that contracting parties, by incorporating into their agreement a contractual provision that a certain portion of their contract shall be subjected to the laws of another state, thereby draw down upon and into their contract, the whole system of laws and policies of that state, so far as it relates to the entire subject matter of their contract, not by way of convention or contractual arrangement, but by their legislative and governmental force, independently of, and contrary to, their stipulations. It was demonstrated in the Cohen case that both the reason and the meaning were clear why a preliminary contract such as an *application* with its representations and warranties, should be made subject to and controlled by the statutes of New York, while the parties might desire to be left their freedom of contract in all other particulars. It can be urged with equal reason and conclusiveness that with the insured, George Dana Hill, having no post office address in the state of New York, and none nearer that state than Puget Sound, which, in April, 1886, was practically extremely remote and difficult and uncertain of being reached by mail, neither party to the contract was willing to stipulate to such a method of notice as that contained in the New York statute; and for that reason, not only declared in their contract that they would not adopt this statutory notice, but instead agreed to a notice of their own provision, mutually satisfactory. In the face of such an express agreement, and the apparent reasons for it, judicial inference should not be indulged in to destroy this arrangement and substitute for it what the parties had specifically discarded.

V.

DOES THE FACT THAT THE INSURANCE IS PAID TO MINOR BENEFICIARIES REQUIRE THAT NOTICE SHOULD HAVE BEEN GIVEN TO SUCH BENEFICIARIES, OR THAT THEY SHOULD, AFTER BEING FULLY ADVISED OF THE INSUPED'S FAILURE TO PAY, HAVE ACQUIESCED IN WHAT HE DID OR OMITTED TO DO?

It will be noted the New York statute does not recognize a beneficiary as a party to be affected by that statute. If in the transaction of business in the state of New York an insurance company proposes, independently of agreement or conduct, or omission on the part of the insured, to declare a forfeiture in the statutory method, it is required in doing so to give notice to but one of two persons—the insured or his assignee.

In the matter of notice under this statute the beneficiary is not known. With him the company has nothing to do. Giving the statutory notice to the beneficiary would avail nothing to the insurance company in the way of declaring a forfeiture, because the beneficiary might carry such notice into court as proof of non-compliance with the statute, in giving notice to an unauthorized person. We take it, so far as the payment of premiums is concerned, and all matters relating to the continuance of the policy, the insured is the principal, but if not the principal then he is the general agent or trustee of the beneficiary, with an irrevocable authority. Entering into a policy of insurance between the insured and the company does not of itself render the beneficiary a party to the contract. Something more is required. Against his will he cannot be made a beneficiary. In some manner or other his acqui-

escence in the contract so as to bring him as a party into it must be with his actual or presumed consent. The fact of benefit would no doubt furnish the presumption of assent, and would be deemed satisfactory evidence of acceptance, only to be overcome by proof of repudiation.

In Lamber vs. Penn. Mutual Life, 24 So., 18, it is said:

"At common law a stipulation in favor of a third person if for his benefit is presumed to be accepted by him."

And in Dunlap vs. Dunlap (Mich.), 53 N. W., 788, the court says:

"There is no force in the objection that there could be no valid gift to Joseph and Elon without an acceptance on their part. The donation being for their advantage, they will be deemed to have accepted it, unless the contrary appears." (p. 790.)

The proof by which the relation is established does not affect the fact that the beneficiary becomes a party thereto, by the adoption of the contract, entered into for his benefit. He can only adopt it as an entirety. He must take the contract just as it has been made, and upon the conditions imposed. In so taking it, he of necessity accepts the insured as his general agent, or trustee, with full power and authority. In claiming as a beneficiary he must assent to the authority of the insured and adopt his acts as those of the beneficiary.

In "The Lucy Anne," 3 Ware, 253, the court says:

"The donor may annex such conditions to his bounty as he pleases; nor at least when he has an interest in his liberality can the beneficiary repudiate the conditions without the consent of the donor. He cannot take that as a free gift to which a condition precedent is annexed." (p. 256.)

This rule applies, regardless of the capacity or incapacity of the donee, else minors and others laboring under inability could not accept or become the beneficiaries of conditional gifts.

Unless the beneficiary, as the third person for whose benefit the contract is made, accepts it as entered into by the insured and the insurance company, there can be no acceptance, and hence no contract. To vary the terms of a contract or accept it so far as beneficial and reject what is not desirable is not in the power of the beneficiary.

In National Bank vs. Hall, 101 U. S., 43, at page 50, it is said:

"A proposal to accept or acceptance upon terms varying from those offered is a rejection of the offer."

Baker vs. Johnson County, 37 Ia., 186.

See also Jenness vs. Mt. Hope Iron Co., 53 Me., 20, and Chicago & Great Eastern Railway Co. vs. Dane, 43 N. Y., 240, and Suydam vs. Clark, 2 Sandf. (N. Y.), 133.

And again in Minneapolis, etc., Ry. vs. Columbus Rg. Mill, 119 U. S., 151, it is said:

"A proposal to accept or an acceptance upon terms varying from those offered is a rejection of the offer, and puts an end to the negotiation unless the party who made the original offer renews it or assents to the modification suggested."

The necessity for acceptance upon the terms of the offer made in order to establish a contract is stated thus in Campania Bilbaina vs. Spanish Am., etc., Co., 146 U. S., 497:

"The contention of the libelant is that the instrument became binding on the parties with the exception of the particular clauses referred to, if the libelant should dis-

sent from those clauses. Thus the same effect is claimed as if the charter party had been returned to the persons who had signed it and the clauses referred to had been erased by mutual consent. But if there is any part of it in regard to which the minds of the parties have not met, the entire instrument is a nullity as to all its clauses."

It matters not whether the beneficiary be a person of capacity or incapacity; in either event, by the very fact of becoming a beneficiary, he subordinates the favors he receives to the conditions and methods of their bestowal. He cannot compel the insured to pay an additional premium. He cannot restrain the insured from absolving himself from the contract. So long only as the insured chooses will he keep the contract alive. The beneficiary, so long as he has the benefit or gratuity through *the favor* of the insured, must abide the consequences of the latter's acts and omissions, as his agent with full authority, in keeping alive or terminating the policy. It may be said that if the beneficiary, after the contract had been entered into, sees fit himself to go to the insurance company with premiums as they fall due and make actual tender, he can do so and the insurer will be bound to accept such payments, but that is entirely aside from the statute of New York, and aside from the provisions of the policy so far as the insured is concerned, and as it is admitted the beneficiaries never tendered or offered payment of any premium, that question cannot arise in this case. If it be true that the insured was the general agent of the beneficiary, with full authority in all matters pertaining to the payment of premiums, then they are bound precisely as if they themselves had done or omitted the things that Hill did and omitted, and the case comes exactly under the rule laid down in this action when before this Court, where it said:

"But it is alleged, not only that the insured and the company agreed to abandon the contract, but also that the beneficiary, his wife and the plaintiffs, their children, failed, neglected and refused to pay the premium, so we have a case in which not only did the insured and the company abandon the contract, but also the beneficiaries neglected and refused to do that which was essential to keep the policy in life." (178 N. S., 350.)

We note in passing, the pleadings fully justify this Court in the view that the "beneficiaries neglected and refused," but the court did not limit the determination of the contract to such "refusal." It said such refusal was sufficient. It did not say that anything else would not be sufficient. We ask the court to bear in mind, along with this contention we are making, that the insured stood as principal, and the only person with whom the insurance company had to deal, as the facts disclose in this record. That the beneficiaries, children of the insured George Dana Hill, were inmates of his home, and a part of the family of which he was the head from the date of his application to the time of his death, and were under his parental care. (Rec. p. 84.) So that he stood, not only as principal, if our contention be correct, but if as guardian or trustee of the beneficiaries—who were instead of himself principals—then they must abide by the consequences of the acts or omissions of their agent.

The sole excuse the children of Hill urge for nonpayment of premiums is that statutory notice was not served upon Hill, but this failure to serve notice did not in any way prevent them from paying or causing the premiums to be paid.

In the case of Wheeler vs. Conn. Mut. Life, 82 N. Y. App., 543, the policies had been assigned by one Vose,

the insured, to his children, for whom he was general guardian. Vose became insane. This was held not to relieve the children.

"Although Vose was their guardian, if incapacitated by his insanity, a competent person could have been appointed in his place, and hence his insanity was not necessarily an insuperable obstacle to their performance of the condition of the policy, and they were not relieved thereby." (p. 550.)

In Klein vs. Insurance Co., 104 U. S., 88, a policy of insurance was issued upon the life of one Frederick W. Klein, payable to his wife, Clara Klein. One of the conditions of the policy was if the stipulated premium should not be paid on or before a certain day the policy should cease and determine. The semi-annual premium, due on the policy March, 1871, was not paid. The wife alleged as a ground of relief that Klein without her knowledge had taken out the policy; that she had received no information of its terms and conditions until after his death; about February 1st he was taken down by the illness from which he died, and that on account of his condition he was incapable of attending to any matters of business, and for that reason failed to pay the premium when it became due. The bill was dismissed in the lower court, and on appeal the Supreme Court affirmed the decree. Mr. Justice Woods, in the opinion, page 92, states:

"She (the wife) was never incapacitated from making payment. The alleged fact that she had no knowledge of the existence and terms of the policy does not relieve her default. If the fact be true, her ignorance resulted from the neglect of her husband, who, in respect to this contract of insurance, was her agent, in not informing her about the insurance on his life, and the term of the policy. The bill is therefore an effort by her to

obtain relief in equity against the appellee from the consequences of the carelessness or neglect of her own agent."

Knickerbocker Life Ins. Co. vs. Pendleton *et al.*, 112 U. S., 696, was a case where a policy of insurance was issued on the life of one Samuel Pendleton for the benefit of the plaintiffs, as the children of the said Samuel H. Pendleton. The policy was conditioned to be void if the annual premium or any obligation given in payment thereof should not be paid at maturity. The annual premium due in July, 1871, was paid by a foreign bill, drawn by the insured, with the condition that the policy should be void if the draft was not paid at maturity. The bill was presented and not accepted on account of want of funds in the hands of the drawee. In the opinion, at page 708, Mr. Justice Bradley says:

"The drawer (Pendleton), who took entire charge of the policy for his children, put its existence upon the condition of the payment of the draft at maturity; and it was his business, as agent and guardian of his children, to see that the draft was thus paid, that the requisite funds were in the hands of the drawees, or that they would pay it whether in funds or not."

In Miles vs. Connecticut Life Ins. Co., 147 U. S., 177, the insurance company issued a policy for $5,000 upon the life of John S. Miles for the sole use and benefit of Sarah G. Miles, his wife. It was at the instance of the insured that the policy was issued, and he paid with his own money all of the premiums. Before the tenth premium became due the insured advised the company that he could not pay that premium and wished a paid-up policy. The company advised him not to do so, but to have so much of the $5,000 released as would enable him, wtih the sum allowed for such release, to pay what would be due as a premium on

the remainder. This was agreed to, and a receipt was presented to him, signed by his wife, for $82.39, as a consideration for the release of $700 of the $5,000, the $82.39 being applied towards a premium on the $4,300. Thereupon the husband received a policy for $4,300 on his own life for his wife's benefit. Subsequently he took a paid-up policy for $1,195 in the same favor, having given what purported to be a receipt signed by the wife. It appears that the wife's name on both receipts was signed by the husband without her assent. In suit on the $5,000 policy brought by the wife the company set up non-payment of premium.

The court held that it was a good defense, and that there was nothing to justify the failure to pay the premium.

In Schneider vs. U. S. Life Insurance Co., 123 N. Y., 109, the court held that a married woman in whose favor a policy of insurance was issued upon the life of her husband could not claim the benefit of the insurance without at the same time assuming all the responsibility of a failure to perform its essential conditions, among them being the payment of premiums.

In the opinion of O'Brien, J., at page 114, it is stated:

"The husband had the possession of the policy, and in dealing with the defendant in regard to it was treated as plaintiff's agent, and the rule that when one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one whose act enabled the fraud to be committed, applies to this case."

See also Manhattan Life Ins. Co. vs. Smith, 44 Ohio State, 156.

In Baker vs. The Union Mutual Life Ins. Co., 43 N. Y. App., 288, the court says:

"The case will not be changed if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and the defendants. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff; and claiming the benefit of his acts and of the policy procured by his agency, she necessarily ratifies and affirms the contract as it was made, with all its terms and conditions. She adopts the acts of the agent and makes them her own. (Elwell vs. Chamberlain, 31 N. Y., 611; Bennett vs. Judson, 21 *id.*, 238.) If the agent exceeds or transgresses his authority, the principal may repudiate his acts altogether, but he cannot affirm in part, and repudiate in part; take the benefit of the favorable parts of a contract and reject the residue."

In Whitehead *et al.* vs. New York Life Ins. Co., 102 N. Y., 143 (6 N. E. 268), a husband procured a policy of life insurance upon his own life for the benefit of his wife, or, in case of her death before his, of their children. Held, that the husband had no authority without the assent of the assured to surrender the policy, such an act not being within the scope of the agency inferable from the taking out of the policy by him; but where such a policy by its terms has become forfeited for failure to pay premiums, the husband may thereafter, in consideration of a sum paid, surrender it. In such case the forfeiture is not waived by the surrender and the assured could not repudiate the surrender and at the same time assert the revival of the policy under it.

Finch, J. (p. 150):

"He (the insured) therefore, in procuring the policies to be made, in paying the premiums, in receiving and acting upon notices and in doing whatever was necessary to perfect and continue the rights of the assured, must stand in the attitude of an agent, acting for and representing the

assured, and as having no interest in the policies, unless, possibly, after the death of all of the assured."

Holmes vs. Gilman, 138 N. Y., 369, 381, 382, is to like effect.

In Mechem on Agency, Section 775, the author states the rule as follows:

"Hence it is a rule of universal application, whether the principal be disclosed or not at the time of entering into the contract, that the principal is affected by, and is subject to, every defense which the other party may have, based upon such fraud, imposition, misrepresentation, concealment or other misconduct of the agent as is, either by a prior authorization or a subsequent ratification, properly chargeable to the principal as having been done or committed by the agent within the scope of his authority, although the principal himself may have been entirely innocent."

VI.

PLAINTIFFS BELOW WERE IN NO WISE PARTIES TO THE CONTRACT OF INSURANCE, BUT DONEES BY REPRESENTATION, THROUGH THEIR MOTHER.

We have shown the application, signed by Hill. It is also noted that it was signed as follows:

"Signature of the person to whom the insurance is payable, Ellen Kellogg Hill, by G. D. Hill."

The application also contains the following:

3. A. Name of person to whom insurance is payable at death? B. Residence? C. Relationship?	A. Ellen Kellogg Hill. B. Seattle, W. T.; C. Wife.

4.	A. If a life policy for the benefit of the wife, shall it be paid to her children, to your children, or to the children of the two, if she be not living at the maturity?	A. To the children of two."

It is thus seen the mother, Ellen Kellog Hill, was the primary beneficiary. The children were the second beneficiaries, and were not even third parties, so to speak, to the contract. Had the mother—who joined in the application—survived and brought this action—it could not be successfully contended she would not be bound and estopped, as Hill himself. The children became beneficiaries only through representation of the mother and hence were relegated to her position. If the mother was not living the policy was payable "to such of the children of their bodies as shall be living." The children took, through their parent. Certainly whatever bound the father and the mother would equally bind the children. The only interest they have in the contract is such as they derived through the application of the parents. They cannot, therefore, contend that they were ignorant of what both of their parents knew, and that they were without knowledge of when the premium became due, and of the demand of payment from their father and natural guardian. The insured had full knowledge.

VII.

SUMMARY UPON THE LAW AND FACTS OF THE CASE.

1. By payment of premium, and delivery of policy, the contract actually came into being in Washington and under the Cohen case became a Washington contract.

2. The insured from the date of the application to his death was a resident of Washington, and had no post-office address in the State of New York. Therefore, the law of New York is inapplicable to this case, because it relates only to instances where the insured or his assignee has a postoffice address within that state. This is a deduction fairly drawn from the Cohen case.

3. The insured was an experienced business man. Personal demand was a number of times made upon him for the premium of 1887 and proper receipt tendered. He declined in each instance to make payment, and suffered the renewal receipt to be returned to the home office, and never again offered payment or askd a renewal of his policy. Upon the faith of his conduct the policy was entered upon the books of the company as lapsed and terminated, and the contract abandoned by the insured. This Court has ruled the New York statute imposed no restraint whatever upon the insured, and left the parties in their mutual relations as free as if it had not been enacted. In any other contract, a failure for four successive years to make annual payments upon a contract as a condition of its continuance, would defeat the defaulting party in an action in the nature of specific performance. Under the decision in the Phinney case this action cannot stand.

4. The insurance company does not rely upon the statute of New York and a forfeiture under it, but it does

rely upos the defense of the insured, having been the *actor,* and *his* conduct terminating this contract. He deliberately chose to violate his contract, to decline and refuse to pay the premum, and to persist in this course for four years, until his death. The Court has held the New York statute in no manner touched or restrained him.

5. If the contract is regarded as a New York contract, it must be so, not as a matter of fact, but by fiction, intendment and convention of the parties, and it will not be so regarded, simply for the purpose of working injustice and building up an otherwise defeated claim.

6. The contract was actually entered into in the state of Washington, and can only be deemed made in New York for the purpose of coming under the operation of the New York statutes, because it is supposed the parties desired the laws of that state to operate upon the contract; but inference and intendment must give way to *fact,* and the fact is that so far as the *application* is concerned, the parties have made *that* portion of the contract *subject* to the laws of the state of New York; and it is equally certain that so far as the after-matter of notice of the due date of premiums, they have made their own express stipulation, and eliminated the statute of New York.

7. The insurance company is a mutual association. Its members are its premium paying policy holders. The funds from which their insurance is paid is supplied by the aggregate of promptly paid premiums, and the income therefrom. Existing members remain, and new members join the association, on the faith of this fund belonging, proportionately, to the contract-performing members in payment of original insurance, increase of policy or reduction of premiums. One premium only having been

paid on this policy, no claim upon the fund exists in favor of Hill or of anyone claiming under him.

8. The insured Hill was the only person under the New York statute—if it applies—with whom the insurance company had anything to do. That statute provides for notice upon the insured and his assignee only. It contemplates no notice upon the beneficiaries, either primary or secondary.

9. If Mrs. Hill, instead of plaintiffs below, were claiming this insurance, she would be estopped, because, having signed the application of insurance, she brought herself within the contract, so as to know or be bound know, its terms. If Hill, as we contend, was the principal in the contract—she receiving the gratuity of his bounty, did so, upon the terms in which he made the contract, and with knowledge that his refusal or conduct could terminate this contract as any other he might enter into. That he was at liberty to pay or decline to pay premiums, or to continue or end the contract. If it is claimed she was the principal and Hill her agent, then she was bound by her agent's act, and could not claim the benefit of the policy without ratifying and assuming whatever he may have done or declined to do in the way of keeping the policy alive.

10. The plaintiffs below were not parties in any manner to the application for the policy of insurance. They never could come under its benefits, except subsequent to its execution and delivery, and until their mother's death, so that they claim under their mother, and whatever would bind her equally binds them.

11. In any event they are the beneficiaries of a gift or gratuity, and can only accept such gift or benefit upon

the terms and conditions upon which it was given, and by the act of acceptance must adopt and ratify the contract, just as it was made with the insured. This conclusion would have made it necessary for them, if principals, to see to it that their agent performed the contract by paying the insurance, or that he abstained from refusing to make payment and abandoning the contract.

The case upon its facts is before this Court, as it was at each stage before the lower courts, and we submit, upon the unquestioned facts and the law, judgment should be rendered in favor of the plaintiff in error.

Respectfully submitted,

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EDWARD LYMAN SHORT,
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Attorneys for the Mutual Life Insurance Company of New York, Petitioner.

APPENDIX

NEW YORK PREMIUM NOTICE STATUTES.

L. 1876 Ch. 341 (May 15, 1876), amended by

L. 1877 Ch. 321 (May 23, 1877), repealed by

L. 1892 Ch. 690, Sec. 295 (took effect Oct. 1, 1892), new statute enacted by

L. 1892 Ch. 690, Sec. 92 (took effect Oct. 1, 1892), amended by

L. 1897 Ch. 218 (took effect April 8, 1897).

LAWS OF 1876.

CHAPTER 341.

An Act regulating the forfeiture of life insurance policies.

Passed May 15, 1876.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, unless a notice in writing, stating the amount of annual premiums or interest due and when due on such policy, and the place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the

insured, postage paid, at his or her last known post office address, not less than thirty nor more than sixty days next before such payment becomes due, according to the terms of such policy.

Sec. 2. The affidavit of any officer, clerk or agent of the company that the notice to the assured, provided for in section one has been duly addressed and mailed by the company issuing such policy to the assured, shall be presumptive evidence of such notive having been duly given.

Sec. 3. This act shall take effect immediately.

LAWS OF 1877.

CHAPTER 321.

An Act to amend chapter three hundred and forty-one of the laws of 1876, entitled "An Act regulating the forfeiture of life insurance policies."

Passed May 23, 1877.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section one of chapter 341 of the laws of eighteen hundred and seventy-six, entitled "An Act regulating the forfeiture of life insurance policies," is hereby amended so as to read as follows:

Sec. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written

or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

Sec. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to

the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given.

LAWS OF 1892.

CHAPTER 690, SEC. 92.

Sec. 92. No forfeiture of policy without notice. No life insurance corporation doing business in this State shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice, stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon

will become forfeited and void except as to the right to surrender value or paid-up policy as in this chapter provided.

If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited or declared forfeited or lapsed, until the expiration of thirty days after the mailing of such notice.

The affidavit of any officer, clerk or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given.

(The above act in Sec. 295 also repealed the acts of 1876 and 1877.)

LAWS OF 1897.

CHAPTER 218.

This act amended Sec. 92 above as follows:

"Sec. 92. No forfeiture of policy without notice.—No life insurance corporation doing business in this State shall within one year after the default in payment of any premium, installment or interest, declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any pre-

mium, interest or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest or installment unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address in this State, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk or agent of the corporation, or of anyone authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be

presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.

Sec. 3. This act shall take effect immediately.